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December 11, 2009

## Via Hand Delivery and First Class Mail

Andrew M. Cuomo, Attorney General  
Office of the Attorney General  
Department of Law  
The Capitol  
Albany, New York 12224-0341

**RE: *Develop Don't Destroy Brooklyn, Inc.***

Dear Attorney General Cuomo:

I represent Develop Don't Destroy Brooklyn, Inc. ("DDDB"). As you may know, for the past six years, DDDB has led the community in opposing the proposed Atlantic Yards project, a 22 acre high rise development slated to be erected in the heart of brownstone Brooklyn. I am writing to bring to your attention important developments concerning the legal underpinnings of the eminent domain proceeding for the project and the project financing.

On December 3<sup>rd</sup>, The Appellate Division, First Department ruled in favor of property owners challenging the Empire State Development Corporation's (ESDC) use of eminent domain on behalf of Columbia University (*Kaur v. NY Urban Development Corp.*).

The majority opinion, by Judge Catterson, is a scathing indictment of ESDC's actions overall and specifically when it comes to utilizing its condemnation powers. Catterson's opinion calls the agency's findings "sophistry" and "idiotic." He calls their efforts to trump up "blight" claim to take properties for Columbia's benefit a "scheme." A concurrence says that they acted in "bad faith" to take plaintiffs' properties.

In a decision on an appeal of an environmental action brought by DDDB and 22 other community organizations, Judge Catterson wrote also of the ESDC, "I believe that the New York Urban Development Corporation Act...is ultimately being used as a tool of the developer to displace and destroy neighborhoods that are 'underutilized.'" *Develop Don't Destroy Brooklyn v. Urban Development Corporation*, 59 A.D.3d 312, 326 (1<sup>st</sup> Dept. 2009)

The ESDC is also the condemnor on behalf of Forest City Ratner's Atlantic Yards project in Brooklyn. In November the Court of Appeals ruled that ESDC could take plaintiff's homes and businesses in the *Goldstein et al. v. NY Urban Development Corp.* case, ruling that the Court should defer to the agency's determinations, specifically its "blight" finding, rather than make an independent determination of the constitutionality of the agency's actions.

It is clear from the Columbia and Atlantic Yards cases that the ESDC has acted in bad faith. It is clear that when the most powerful public corporation in the State is found by a court to violate due process and act in bad faith to benefit large, wealthy and powerful corporations and institutions, that that agency no longer deserves any deference.

To the contrary it is time to investigate that agency and its actions.

In Brooklyn we have had to observe the ESDC act in bad faith over the past six years of the Atlantic Yards controversy. Identical to the actions of Columbia University, Forest City Ratner identified the property it wanted, and the ESDC, with the help of its retained "expert", AKRF, found blight based on underutilization, the existence of boiler violations, and cracked sidewalks. Nothing the *Kaur* majority wrote about the agency is a surprise to us.

We call on you to investigate ESDC with the full force of your office. They have done too much damage to individuals and neighborhoods, and to the good will of the citizens of New York, and to the people's faith in government. They cannot be allowed to continue acting in the way described by Judge Catterson.

We also want to bring to your attention disturbing and potentially illegal aspects of the financing of Atlantic Yards. In 2006 the ESDC approved bonds for \$100 million in financing for infrastructure related to the project. In accordance with Public Authorities Law § 51, the Public Authorities Control Board (PACB) approved that financing.

In 2008, the Job Development Authority (JDA), created a subsidiary local development corporation, the Brooklyn Arena Local Development Corporation (BALDC) which in November 2009, approved over \$500 million in bond financing for the Arena which is the core of the Atlantic Yards project. That decision to approve the issuance of bonds, characterized as non-recourse bonds, presents at least two significant problems.

First, the BALDC is a subsidiary of the JDA. We do not understand why the BALDC is a subsidiary of the JDA and not the ESDC. However, we do not see how the BALDC and the financing of the arena fit within the statutory purposes of the JDA to promote job growth, training and development.

Second, and more disturbing is that the decision to issue over \$500 million in debt is apparently completely exempt from review by the PACB or the State Comptroller. Under PAL

Andrew M. Cuomo, Attorney General

December 11, 2009

Page 3

§51, the PACB must review and approve all financing by ESDC and the JDA after an opportunity by the Comptroller to review the proposed action. The PACB's review extends to the financing by any subsidiary of the ESDC and JDA. However, only subsidiaries which have the same members or directors as the ESDC or JDA are subject to PACB and Comptroller review. PAL § 51(1). BALDC has different directors than the JDA and thus not subject to PACB review.

This is an absurd and incongruous result. By taking advantage of this loophole, ESDC has manipulated the process to allow \$500 million of bond financing to avoid third-party scrutiny and the protections established by the legislature when the PACB was established in 1976. While the BALDC bonds are ostensibly non-recourse bonds for which the State has no obligation, in reality it has long been recognized that the State has a moral obligation for such bonds. It was exactly this kind of reckless financing by the Urban Development Corporation in the 1970's that lead to State's fiscal crises when it was forced to meet those moral obligations of the UDC and then lead to the PACB to oversee the financing decisions of supposedly independent authorities.

It is clear from the Columbia and Atlantic Yards cases that the ESDC has acted in bad faith. It is clear that when the most powerful public corporation in the State is found by a court to violate due process and act in bad faith to benefit large, wealthy and powerful corporations and institutions, that that agency no longer deserves any deference.

Keep in mind that in 2006 the PACB resolution for Atlantic Yards did not approve these bonds and the cost of the arena has nearly doubled since that time, while the viability of the rest of the 8 million square foot project has been extremely diminished. Additionally there is an entirely new arena and Nets ownership structure, yet to be approved, since Forest City Ratner sold 80% of the team and 45% of the arena to Russian investor Mikhail Prokhorov.

Thus, we call on you to investigate the decision to create the BALDC in a manner clearly designed to avoid financial oversight and take action to protect New Yorkers from an increased debt burden that has not been subject to review by the Comptroller or the PACB.

Thank you.

Sincerely,

Jeffrey S. Baker  
for Develop Don't Destroy Brooklyn, Inc.

cc via fax and mail: Governor David A. Paterson (Fax No. 473-7619)  
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Andrew M. Cuomo, Attorney General

December 11, 2009

Page 4

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